FAWZIA OSMAN

v.

BANK BUMIPUTRA (M) BHD.

SUPREME COURT, KUALA LUMPUR
LEE HUN HOE CJ (BORNEO)
MOHD. AZMI SCJ
MOHD. YUSOFF MOHAMED SCJ
[SC CIVIL APPEAL NO. 02-129-90]
26 DECEMBER 1990

BANKRUPTCY: *Bankruptcy notice - Validity - Failure to quantify interest - Date of realisation - Uncertainty - Due and payable at date of issue of notice - Interests which are accrued and payable - Nature of defect - Formal or irregular - Whether cured - Null and void ab initio - Bankruptcy Act 1967, ss. 3(1)(i), 131 - Bankruptcy Rules 1969, r. 274.*

Bankruptcy notices were issued against the appellants (a married couple) on 15 October 1986; the demand for payment in each case was in identical terms and the act of bankruptcy relied upon by the respondent bank was the appellants' failure to comply within 7 days of service with the requirements for payments of judgment debt, interests and costs pursuant to s. 3(1)(i) of the Bankruptcy Act 1967 (the Act). The trial Judge found that the petitions were in order and granted receiving and adjudicating orders against the appellants. The appellants sought to set aside those orders on the ground that the bankruptcy notices were null and void *ab initio* for non-compliance with s. 3(1)(i). The learned Judge concluded that the notices were not defective and dismissed the appellant's notice of motion.

The appellants argued that the statement in the bankruptcy notice for payment of interest from 31 October 1984 to date of actual realisation was not quantified and therefore the notices were null and void *ab initio.*

Held:

[1] Since the debtor is entitled to know exactly the actual sum that he has to pay to avoid the commission of the act of bankruptcy, it is essential that the notice must quantify the total sum required to be paid for the purpose of that particular bankruptcy notice.

[2] By leaving the amount of interests at large "to date of actual realisation", there is uncertainty in the actual amount due and payable which is required to be settled by the notices within seven days of service.

[3] At the notice stage, what the creditor should be concerned with was limited to the amount of interest in accordance with the terms of the Court order that was due and payable as at the date of issue of the notice or at any earlier fixed date which was capable of being quantified for the purpose of s. 3(1)(i) of the Act.

[4] (a) The words, "in accordance with the terms of the judgment or order" in s. 3(1)(i) qualify the words "judgment debt" and as well as "sum ordered to be paid";

(b) it is not sufficient merely to reproduce the terms of the judgment or order in the body of the notice unless the judgment or order by its terms has either by consent or otherwise quantified not only the judgment debt, but also the interests and costs;

(c) all sums demanded to be paid should be capable of being made the subject of execution, which meant that the amount required to be paid in the notice must not only be due and payable at the date of issue of the notice but also that the execution thereon had not been stayed;

(d) it is wrong to include in the notice any sum which is not yet due and payable by the debtor as at the date of the issue of the notice;

(e) the Court rejected the popular misconception that in all cases the amount claimed in the notice is said to be both quantifiable and quantified so long as the formula for calculation of interests ordered by the Court is supplied;

(f) calculation of interests in accordance with the terms of the Court order must be complied with, but such formula is of no assistance at all without the creditor supplying a fixed date up to which the interests have become due and payable for the purpose of the particular notice;

(g) by demanding interests "from 31 October 1984 to date of actual realisation", in the bankruptcy notices issued on 15 October 1986, the respondent bank had blatantly included firstly, a demand for payment of interests, a portion of which was not yet due and payable as at the date of the notice, and secondly, a demand for payment of interests for a period which was uncertain and undeterminable for the purpose of quantification in accordance with the terms of the Court order.

[5] The terms of the order on interests for the purpose of calculation are insufficient ingredients unless the time frame is supplied by the creditor, and not left open to an undeterminable date, bearing in mind that only interests which have accrued and are payable can be made the subject of the notice under s. 3(1)(i) of the Act.

[6] The sums required to be paid in both notices were ambiguous and uncertain resulting in the inability of the respondent bank to quantify them.

[7] The defect was not a formal one or a mere irregularity that could be cured by s. 131 of the Bankruptcy Act or by r. 274. Both the notices were *void ab initio* and non-compliance with them would not constitute an act of bankruptcy under s. 3(1)(i) of the Act.

[Appeal allowed.]

Cases referred to:
Lim Boon Peng v. United Orient Leasing Company Bhd. [1991] 1 CLJ (Rep) 270
Low Mun v. Chung Khiaw Bank Ltd. [1988] 1 MLJ 263
Re Ismail bin Daud & Hjh. Qameriah bt. Fateh Mohamed [1989] 1 CLJ (Rep) 617

Legislation referred to:
Bankruptcy Act 1967, ss. 3(1)(i), 131
Bankruptcy Rules 1969, r. 274

For the appellants - Thangaraj Balasundram; M/s. Zainuriah & Thangaraj
For the respondents - Ahmad Nazri Ibrahim; M/s. Mohd. Akhir & Partners

JUDGMENT

Mohd. Azmi SCJ:

Both these appeals were heard together as they involved identical issues of law on the validity of the bankruptcy notices issued against a married couple (the appellants) on 15 October 1986, and served on them by substituted service. The demand for payment in each case was

in identical terms, and the act of bankruptcy relied upon by the respondent bank was the appellants' failure to comply within seven days of service with the requirements of the notices for payment of judgment debt, interests, and costs, as provided under s. 3(1)(i) of the Bankruptcy Act 1967. The learned Judge had found both the petitions for bankruptcy against the appellants in order, and accordingly granted receiving and adjudicating orders against the husband (Zulkifli) on 1 March 1989 and against the wife (Fawzia) on 3 May 1989. By notice of motion dated 11 December 1989, the appellants applied to set aside the receiving and adjudicating orders on the ground that the bankruptcy notices were null and void *ab initio* for non compliance with the provisions of s. 3(1)(i) and as such, the appellants had not committed any act of bankruptcy under that sub-section. The learned Judge concluded that the notices were not defective and dismissed their motion with costs.

In both these appeals, the requirements in the bankruptcy notices for payment within seven days were for "the sum of RM612,065.07 together with interest to accrue thereon at the agreed rate of 13.25% per annum as from 31 October 1984 to date of actual realisation and RM300 costs."

Before us Counsel for the appellants repeated his argument in the High Court that whilst the judgment debt and costs were quantified in the notices, the demand for payment of interests was left at large from 31 October 1984 "to date of actual realisation" at 13.25% per annum. Relying on the decision of this Court in *Low Mun v. Chung Khiaw Bank Ltd.* [1988] 1 MLJ 263 which required judgment debt, interests and costs to be quantified, he argued that the notices served on both the appellants were null and void *ab initio.* He also referred to us the case of *Re. Ismail bin Daud & Hjh. Qameriah bt Fateh Mohamed* [1989] 1 CLJ (Rep) 617, 624 where the same learned Judge in annulling a bankruptcy notice as invalid and incapable of being saved by s. 131 of the Bankruptcy Act, had ruled:

> I hold that where in the body of the notice, to the ingredients for calculating the interest ordered, the words 'and continuing' or other words of like effect are appended, that could amount to the demand being uncertain and as such bad.

By the same token, learned Counsel urged us to conclude that the learned Judge ought to have held the words "to date of actual realisation" in the body of the notices as equally bad in law.

The basis of an act of bankruptcy under s. 3(1)(i) is non-compliance within seven days of service with a valid bankruptcy notice, requiring the debtor to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order. Unless ordered to be assessed by the Registrar, the judgment debt is usually quantified in the judgment of the Court, but invariably it is not so in the case of other sums ordered to be paid, such as interests and costs. Since the debtor is entitled to know exactly the actual sum that he has to pay to the commission of the act of bankruptcy, it is essential that the notice must quantify the total sum required to be paid for the purpose of that particular bankruptcy notice. In these appeals, by leaving the amount of interests at large "to date of actual realisation", there is uncertainty in the actual amount due and payable which is required to be settled by the notices within seven days of service. As conceded by Counsel for the respondent, at the date of their issue, no one knew if the whole interests ordered to be paid would be realised; let alone the date of actual realisation. When the date of realization is questionable, and without any fixed date being supplied, the amount of interests required to be paid in the notices was equivocal and incapable of being quantified in accordance with the terms of the Court order for bankruptcy purposes. We were not here concerned with the full amount of interests that the creditor would finally be entitled to under the terms of the judgment or

order. That might be relevant at the petition or subsequent stage of the bankruptcy proceedings. At the notice stage, what the creditor should be concerned with was limited to the amount of interests in accordance with the terms of the Court order that was due and payable as at the date of issue of the notice or at any earlier fixed dated which was capable of being quantified for the purpose of s. 3(1)(i).

In our view the words, "in accordance with the terms of the judgment or order" in s. 3(1)(i) qualify the words "judgment debt" and as well as "sum ordered to be paid", for which the Court may, for instance order the judgment debt to be assessed by the Registrar, or the costs to be taxed, or the interests to be paid for a particular period at a fixed yearly rate. So, it is not sufficient merely to reproduce the terms of the judgment or order in the body of the notice unless the judgment or order by its very terms has either by consent or otherwise quantified not only the judgment debt, but also the interests and costs. Further, as stated by this Court in *Low Mun, (ante) and Lim Boon Peng v. United Orient Leasing Company Bhd.* [1991] 1 CLJ (Rep) 270, all sums demanded to be paid should be capable of being made the subject of execution, which meant that the amount required to be paid in the notice must not only be due and payable at the date of issue of the notice but also that the execution thereon had not been stayed. Thus, it is wrong to include in the notice any sum which is not yet due and payable by the debtor as at the date of the issue of the notice. It is, in this connection, that we must reject the popular misconception that in all cases the amount claimed in the notice is said to be both quantifiable and quantified so long as the formula for calculation of interests ordered by the Court is supplied. Invariably, the terms of the order on interests for the purpose of calculation are insufficient ingredients unless the time frame is supplied by the creditor, and not left open to an undeterminable date, bearing in mind that only interests which have accrued and are payable can be made the subject of the notice under s. 3(1)(i). Calculation of interests in accordance with the terms of the Court order must of course be complied with, but such formula is of no assistance at all without the creditor supplying a fixed date up to which the interests have become due and payable for the purpose of the particular notice.

In the present appeals we found that by demanding interests "from 31 October 1984 to date of actual realisation", in the bankruptcy notices issued on 15 October 1986, the respondent bank had blatantly included firstly, a demand for payment of interests, a portion of which was not yet due and payable as at the date of the notice, and secondly, a demand for payment of interests for a period which was uncertain and undeterminable for the purpose of quantification in accordance with the terms of the Court order.

Accordingly, we entirely agreed with the submission of Counsel for the appellants that the sums required to be paid in both notices were ambiguous and uncertain resulting in the inability of the respondent bank to quantify them. We agreed that the defect was not a formal one or a mere irregularity that could be cured by s. 131 of the Bankruptcy Act or by r. 274. Both the notices were void *ab initio* and non-compliance with them would not constitute an act of bankruptcy under s. 3(1)(i).

We accordingly allowed both these appeals with costs by setting aside the receiving and adjudicating orders, and we also ordered the deposits to be refunded to the appellants.

Also found at [1991] 1 CLJ 652